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No. 73-925

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In the Supreme Court of the United States

OCTOBER TERM, 1973

CARLTON ELLIS ALLISON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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Petitioners contend that the trial court committed reversible error in allowing an alternate juror to remain with the twelve regular jurors during a portion of the jury's deliberations.

After a jury trial in the United States District Court for the Northern District of Alabama, petitioners were all convicted of conspiring to transport, receive, and sell stolen motor vehicles, in violation of 18 U.S.C. 371, 2312 and 2313. In addition, petitioners Allison, Holladay, and Perry were convicted on single counts of selling or receiving stolen motor vehicles in interstate commerce, in violation of 18 U.S.C. 2313, and petitioners Ralph Marquez and Michael Marquez were convicted on single counts charging interstate transportation of

stolen motor vehicles, in violation of 18 U.S.C. 2312.[1] On appeal, the court of appeals remanded the case for the purpose of holding an evidentiary hearing as to whether there was "a reasonable possibility that the presence of * * * [an] alternate [juror] affected the jury's verdict" (Pet. App. A, p. 8). After the hearing, the trial judge concluded, in an order containing detailed findings of fact and conclusions of law, that the presence of the alternate juror had not affected the jury's deliberations ~~of~~ verdict. The court of appeals affirmed *per curiam* (Pet. App. B).

After a trial lasting almost three weeks, the court convened on August 4, 1972, to charge the jury. At that time, the court, in chambers, informed all of the attorneys involved in the trial that one of the jurors, Mr. Finch, had been ill during the preceding night, but that he felt he would be able to continue (Tr. 2926).[2] The court suggested that the best procedure might be to keep the alternate juror, Mr. Henry, away from the jury but available in the event that it became necessary to excuse the ill juror. The court alternatively suggested that the alternate juror could be allowed to sit in the jury room with instructions not to participate in any way, or that counsel might stipulate that the jury

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[1]Each petitioner was convicted on a total of two counts. Petitioners Allison, Holladay, Ralph Marquez, and Michael Marquez were sentenced to concurrent terms of three years' imprisonment; petitioner Perry was sentenced to concurrent terms of five years' imprisonment.

[2]"Tr." refers to the transcript of the trial. "H.Tr." refers to the one volume transcript of the evidentiary hearing on remand, a copy of which we are lodging with the Clerk.

could proceed so long as eleven jurors remained (Tr. 2927). Counsel for petitioner Ralph Marquez preferred that the alternate juror be allowed to sit with the jury (Tr. 2927-2928). The prosecutor suggested that the ailing juror be excused, but neither the trial judge nor defense counsel felt that the juror's condition was so serious as to warrant his discharge (Tr. 2928). Another defense attorney indicated that he preferred that the alternate sit with the regular jurors with instructions not to participate in the deliberations (Tr. 2929). None of the defense attorneys objected to this latter procedure.

In the courtroom, in the presence of all the parties and the jury, the court gave the following instruction (Tr. 2930-2931):

> THE COURT: Now, Mr. Henry, you are the alternate juror in this case. And just in case Mr. Finch is not feeling well enough to continue during the morning, I am going to keep you here with the jury. I am required to instruct you and the jury that during the deliberations that you are not to participate in any way. You are not to make any suggestions or you are not to help them in any way. Just be there in case we need you.
>
> MR. HENRY: Yes, sir.
>
> THE COURT: And, of course, you realize you would not participate in any vote or do anything other than just be availabe.
>
> MR. HENRY: Yes, sir.
>
> THE COURT: You would hear whatever is said and you would be up to date, but that's all.

MR. HENRY: Yes, sir.

Petitioners made no objection to the procedure or to the instruction.

The jury was then charged. At 10:20 a.m. the jury retired to deliberate, with the alternate juror sitting with them. They went to lunch at 11:55 a.m. and returned at 1:30 p.m. At that time it appeared that the previously ailing juror was feeling well and would be able to complete the deliberations. The alternate juror was then excused. After three more hours of deliberation the jury returned verdicts of guilty. At the hearing on remand, each of the jurors and the alternate was questioned out of the presence of the others.[3] Each juror testified that the alternate had taken no part in the deliberations or in any vote, and that he had not indicated his views regarding any of the defendants either orally, in writing, by facial expression, or by gestures (H. Tr. 38-39, 45, 51-52, 59, 65-66, 71-73, 77-78, 82, 87, 91, 95-96, 100-101, 104-105). Each juror testified that the alternate's presence did not restrain him in any way in expressing his views or in exercising his independence of thought and action (H. Tr. 46, 52, 59, 66, 73, 78, 82, 87-88, 91-92, 96, 101, 105). The alternate juror testified that he sat in a corner and listened but in no way participated in the deliberations (H. Tr. 39-40). The foreman of the jury testified that the alternate juror did nothing that would affect any other member of the jury in any way

[3]Prior to the examination of the jurors the trial judge solicited suggestions from counsel for petitioners as to questions that should be asked other than those outlined by the court of appeals. No questions were suggested concerning the alternate juror's presence during deliberations. The attorney for petitioner Ralph Marquez requested and was allowed to ask a question of the previously ailing juror, Mr. Finch (H. Tr. 84).

(H. Tr. 52). The trial judge concluded "that there is not a reasonable possibility that the verdict of any juror was affected by the fact that Mr. Henry, the alternate juror, was present during part of the jury's deliberations" (Findings of Fact, Conclusions of Law and Order, at 4).

Petitioners contend that while Rule 23(b), Fed. R. Crim. P., provides for trial by a jury of less than twelve when stipulated by the parties, the parties cannot stipulate to a jury of more than that number, and that the jury here was composed of more than twelve. The record belies this claim. The alternate was instructed not to participate in the deliberations in any fashion and he followed those instructions to the letter. Moreover, he was present with the jury for only the first one-third of their deliberations. The court below properly found, even prior to the hearing on remand, that petitioners were, in fact, tried by "a jury composed of twelve members with an alternate observing a portion of the deliberations" (Pet. App. A, p. 5).

Nor does the failure to follow Rule 24(c), Fed. R. Crim. P.,[4] require reversal in this case. Petitioner's reliance on *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (C.A. 4), is misplaced. As the court below noted (Pet. App. A, pp. 6-8):

> In *Virginia Erection*, a new trial was necessitated by a combination of procedural irregularities which are not present in the instant case. First of all the alternate was instructed "to say nothing unless one of the regular jurors should become ill or

[4]Rule 24(c), Fed. R. Crim. P., provides in relevant part that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

> 'disqualified,'" 335 F.2d at 870. The Fourth Circuit reasoned that the district court by this instruction had apparently delegated to the alternate and to the ill juror the strictly judicial functions of "determining disqualification of a regular juror and ordering replacement by an alternate." *Id.* at 871-872. Additionally, when it came to the attention of the trial judge that one of the jurors might be unduly prejudiced, he called the juror into his chambers and, "in the presence of all counsel, the court reporter, a deputy marshal and notary public," *id.* at 872, extensively interrogated her. After reviewing these proceedings, the Fourth Circuit concluded that "[t]here exists the grave danger that the interrogation of Miss Furr may have operated as a restraint upon her freedom to function as a juror." *Id.* at 873.
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>
> In *Virginia Erection,* the alternate had not been instructed not to say anything or to do anything other than "just be there in case *we* need you." Instead, the court's instruction apparently gave the alternate and ill juror the authority to decide when the alternate was needed. Furthermore, regardless of the presence of the alternate during jury deliberations, the new trial was, in the circumstances of that case, required by the trial court's interrogation of one of the jurors. [Emphasis in original.]

Moreover, the court in *Virginia Erection* noted that the alternate juror had been present throughout the jury's deliberations, and might have conveyed his attitude through facial expressions or gestures, thereby influencing one or more of the jurors. 335 F. 2d at 872. The possibility

that the alternate's presence may have operated as a restraint upon the juror's freedom of action or expression was also noted. *Ibid.* These possibilities were recognized by the court below and inquiry was made precisely about them at the evidentiary hearing. After the hearing, the district court found that the alternate had not communicated his own attitude to the other jurors and that his presence had not operated as a restraint upon any juror's freedom of action or expression.

Relying on *United States* v. *Beasley*, 464 F.2d 468 (C.A. 10), petitioners contend that the holding of an evidentiary hearing was itself improper. The facts in *Beasley*, however, were very different. There the alternate had retired for deliberations with the jury without the knowledge of the parties or the court, so that the deliberations were begun with thirteen jurors—not, as in this case, with twelve jurors and an alternate who had been instructed not to participate. When the parties became aware that the alternate had not been discharged, defense counsel moved for a mistrial. A hearing was held to determine the extent of the alternate's participation, after which the motion was denied. On appeal, the court of appeals held that the motion for a mistrial should have been granted without a hearing, reasoning that the hearing constituted "a dangerous intrusion into the proceedings of the jury." *Id.* at 470. No such intrusion or interference was caused by the hearing here, which was conducted after the jury's deliberations had concluded.

It might have been a better practice for the court to have excused the ailing juror prior to the jury's deliberation, as suggested by the prosecutor, or for the parties to have stipulated that, if necessary, they would proceed with a jury of less than twelve, as provided in Rule 23(b), Fed. R. Crim. P. However, the course taken here was at the request, and with the consent, of counsel for at least two of the petitioners, with the apparent acquiescence of all other defense counsel, and petitioners therefore have waived any objections to it. Moreover, as the hearing disclosed, the verdict was not in any event affected by the alternate's presence in the jury room, and any error was therefore harmless.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]Petitioners declined the request of the court below to file briefs on the remand issue (Pet. App. B, p. 2). An issue not raised below, particularly after a request to address that issue, should not be considered by this Court. *Tacon* v. *Arizona*, 410 U.S. 351; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2.